

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RALPH HOWARD BLAKELY,)	CASE NO.: C07-1803-RAJ-MAT
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	
HERB SNIVELY, et al.,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Plaintiff proceeds *pro se* and *in forma pauperis* in this 42 U.S.C. § 1983 action. He seeks a preliminary injunction to compel the Washington State Department of Corrections (DOC) to provide proper medical treatment. (Dkt. 24.) Specifically, plaintiff seeks an order compelling the DOC to transport him to a Dr. Justin McCormick for “Spinal Decompression” and to supply him with “Glucosamine Chondrotin [sic] for the synovial knee lubricating fluid, and Vitamin ‘E’ to [relieve] . . . leg muscle cramps.” (Dkts. 21 & 24.) Defendants oppose plaintiff’s motion. (Dkts.

¹ It initially appeared plaintiff also sought treatment with cyanocobalamin. (*See* Dkt. 21 at 1.) However, he clarified that he “does not mention cyanocobalamin on the current requested

31 & 38.) In addition to replying to defendants' response (Dkts. 33 & 39), plaintiff submitted a related motion to admit supplemental declarations (Dkt. 34). Defendants also oppose that motion. (Dkt. 35.) Now, having considered plaintiff's motions, defendants' responses, and the remainder of the record, it is recommended that plaintiff's request for injunctive relief and his motion to admit supplemental declarations be denied for the reasons set forth below.

DISCUSSION

A grant of preliminary injunctive relief requires: "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)." *Johnson v. California State Bd. Of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995) (quoted case omitted). Alternatively, a moving party may show *either* a combination of likely success on the merits and the possibility that he/she will suffer irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in the moving party's favor. *Id.* (cited sources omitted).

"Under any formulation of the test, plaintiff must demonstrate that there exists a significant threat of irreparable injury." *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). *Accord Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) ("At a minimum, a plaintiff seeking preliminary injunctive relief must demonstrate that it will be exposed to irreparable harm.") "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege

order to compel, because he has been taking [it] every morning since October, 2007." (Dkt. 39 at 1.)

01 imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened
02 injury as a prerequisite to preliminary injunctive relief.” *Carribean Marine Servs. Co.*, 844 F.2d
03 at 674 (internal citation and other cited sources omitted; emphasis in original). Also, as the United
04 States Supreme Court has noted, “[i]t frequently is observed that a preliminary injunction is an
05 extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear*
06 *showing*, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)
07 (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure § 2948, pp. 129-30
08 (2d ed. 1995)) (emphasis added by Supreme Court).

09 In this case, plaintiff seeks to compel the provision of proper medical treatment. He also
10 objects to the declaration of Dr. John Kenney, submitted by defendants, and seeks to submit
11 supplemental declarations in response to Dr. Kenney’s declaration.

12 A. Preliminary Injunction

13 Plaintiff seeks an immediate referral to a Dr. Justin McCormick (or alternatively Dr.
14 Sanford Wright) for treatment of a back condition. He describes his back condition in different
15 terms, such as a “severe SPINAL neurogenic shock causing spactic [sic] paralysis,” an injured or
16 torn disc, and a “hyperextension injury” of the spinal cord. (Dkt. 21 at 1-2.) Plaintiff further seeks
17 the provision of glucosamine and/or chondroitin for his knee and Vitamin E for leg muscle cramps.

18 Defendants contend that none of the treatments sought by plaintiff are medically necessary
19 or even medically indicated at this time. (Dkt. 32 (Decl. of Dr. John Kenney), ¶ 2.) They maintain
20 that plaintiff has a history of chronic degenerative disc disease of the low back, a progressive,
21 degenerative condition, and dispute plaintiff’s contention that this condition was caused by an
22 acute injury. (*Id.*, ¶¶ 3-4.) They assert that plaintiff’s medical records reveal no objective signs

01 of disc protrusion, herniation, or injury. (*Id.*, ¶ 4.) Defendants further assert that, despite the
02 absence of any objective symptoms of disc injury, plaintiff has been referred for a MRI scan of his
03 low back and will be referred to a neurosurgeon only if the findings of that scan are consistent with
04 disc intrusion or impingement. (*Id.*, ¶¶ 3-4.)

05 Defendants also dispute the medical necessity or indication of either glucosamine and/or
06 chondroitin for plaintiff's knee or Vitamin E for his legs. (*Id.*, ¶ 6 and Dkt. 38 (Supp. Decl. of Dr.
07 John Kenney), ¶ 2.) They note that none of these substances are covered as medications under
08 the Washington State Department of Corrections Offender Health Plan Formulary, but can be
09 purchased by inmates over-the-counter at the Offender Store. (*Id.*) Defendants aver that, while
10 there may be some anecdotal evidence that Vitamin E and Omega 3 fish oil have helped certain
11 patients, neither is a medically proven course of treatment for muscle cramps. (Dkt. 32, ¶ 6.)
12 They also aver, with respect to glucosamine and Omega 3 fish oils, that alternate, medically proven
13 courses of treatment are available for treatment of plaintiff's conditions on a more probable than
14 not basis. (Dkt. 38, ¶ 2.)

15 Defendants argue that plaintiff fails to prove imminent danger and irreparable harm if his
16 requests are not granted. They further maintain that, even if plaintiff could satisfy that test, he fails
17 to establish the likelihood of his success on the merits. For the reasons described below, the Court
18 agrees with defendants that plaintiff fails to support his request for preliminary injunctive relief.

19 Plaintiff fails to demonstrate immediate threatened injury. He did not submit evidence
20 countering defendants' contentions as to the nature and severity of his back condition. In fact, a
21 November 16, 2007 medical document plaintiff submitted with his reply supports defendants'
22 contention as to the degenerative nature of his back condition. (Dkt. 33, Ex. at 4 ("Impression:

01 Multilevel degenerative disk disease of a moderate degree. Otherwise, unremarkable exams.”)
02 (case altered).) As such, plaintiff’s assertion as to the need for a referral to a specialist for his back
03 is no more than speculative.²

04 Plaintiff does submit documentation providing support for his request for glucosamine
05 and/or chondroitin for his knee. (*Id.* at 6 (June 26, 2006 note from physician’s assistant stating:
06 “I am going to see if we can get him glucosamine.”), 9 (January 26, 2007 note from Dr. James
07 Swenson stating: “I would recommend glucosamine and /or chondroitin medication daily for the
08 next six weeks to see if we can get a response. If this does respond, I would have him continue
09 on this permanently.”), and 10 (September 14, 2007 note from Dr. Swenson stating: “Treatment
10 options would be medications, bracing, injections, or surgery. He really does not want the
11 injections. He has declined those today. So, the option would be orally glucosamine and
12 chondroitin. I would certainly recommend this for him.”)) However, critically, he does not
13 demonstrate irreparable injury in the absence of glucosamine and/or chondroitin. Moreover,
14 plaintiff apparently refused alternative, covered treatment for his knee condition. (*Id.* at 10
15 (plaintiff declined injections for his knee pain).)

16 Likewise, plaintiff fails to support the contention that defendants’ failure to provide him
17 with Vitamin E poses a significant threat of irreparable injury. Although plaintiff attests to the
18 many benefits afforded by Vitamin E (*see* Dkt. 39, Exs. at 4-7), his assertion as to harm is no more
19 than speculative.

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21 ² Two notes from Dr. James Swenson in January and September of 2007 contain
22 recommendations for neurosurgery evaluation for plaintiff’s back. (Dkt. 33, Ex. at 9-10.)
However, Dr. Swenson consulted in those sessions solely as to plaintiff’s knee condition and
clarified that he did not treat back or spinal issues. (*Id.*)

01 As stated above, a grant of preliminary injunctive relief requires a showing of a significant
02 threat of irreparable injury. *Caribbean Marine Servs. Co.*, 844 F.2d at 674; *Oakland Tribune,*
03 *Inc.*, 762 F.2d at 1376. Because plaintiff fails to make such a showing, his motion for a
04 preliminary injunction should be denied.

05 B. Supplemental Declarations

06 In support of their opposition to plaintiff's motion for a preliminary injunction, defendants
07 submitted a declaration from Dr. John Kenney. (Dkt. 32.) Dr. Kenney served as the Medical
08 Director for the Washington State Reformatory in Monroe, Washington between 2001 and
09 September 2007, and has served as the Health Care Manager at Monroe since October 2007. (*Id.*,
10 ¶ 1.) He oversees the medical treatment provided to inmates, including plaintiff. (*Id.*, ¶ 2.)

11 Plaintiff notes that he has never been treated by Dr. Kenney and seeks to strike the
12 declaration on the basis that Dr. Kenney is not qualified to speak to his claims.³ He additionally
13 seeks to submit responsive declarations from himself and another inmate, Leslie A. Pounds, on this
14 subject. (*See* Dkt. 34, attached Decls.)

15 Dr. Kenney holds a supervisory position over the medical staff providing care to plaintiff
16 and attests that he reviewed plaintiff's medical records prior to submitting his declaration. (Dkt.
17 32, ¶ 2.) As such, it cannot be said that Dr. Kenney lacks adequate qualifications to opine to the
18 opinions set forth in his declaration. Moreover, the supplemental declarations submitted by
19 plaintiff are not pertinent to the resolution of his motion for a preliminary injunction. Plaintiff's
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21 ³ Plaintiff also objected to Dr. Kenney's failure to address the issue of glucosamine and/or
22 chondroitin in his initial declaration. However, as ordered by the Court, Dr. Kenney provided a
supplemental declaration on that issue. (*See* Dkts. 36 & 38.)

01 declaration serves as a request to strike Dr. Kenney's declaration, which should be denied for the
02 reason set forth above. Pounds' declaration lacks relevance to plaintiff's contentions in this case
03 and, rather, concerns his own complaints against Dr. Kenney as raised in a separate lawsuit.
04 Accordingly, plaintiff's motion to admit supplemental declarations should also be denied.

05 CONCLUSION

06 For the reasons set forth above, the Court recommends that plaintiff's motion for a
07 preliminary injunction and his motion to admit supplemental declarations be denied. A proposed
08 Order accompanies this Report and Recommendation.

09 DATED this 14th day of April, 2008.

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11 Mary Alice Theiler
12 United States Magistrate Judge
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